

Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

GLEN WHORTON, Director, et al.,

Petitioners,

v.

STEVEN WAYNE COLLIER,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GEORGE J. CHANOS

Attorney General

State of Nevada

DAVID K. NEIDERT *

Senior Deputy Attorney General

Criminal Justice Division

5420 Kietzke Lane, Suite 202

Reno, Nevada 89511

Telephone: (775) 850-4110

* Counsel of Record

QUESTIONS PRESENTED

1. Is a federal court required to afford a presumption of adequacy to a state procedural bar that was clearly and expressly relied upon by the state court to preclude consideration of a claim that was subsequently presented in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254?
2. In a federal habeas corpus action brought pursuant to 28 U.S.C. § 2254, what showing is necessary to place at issue the adequacy of a state procedural bar that was clearly and expressly relied upon by the state court to preclude consideration of a claim?
3. Which party bears the ultimate burden of demonstrating the adequacy or inadequacy of a state procedural bar?

PARTIES TO PROCEEDING

Glen Whorton, Director, Nevada Department of Corrections

George J. Chanos, Attorney General of the State of Nevada

Glen Whorton is the successor in office to Robert Bayer.

George J. Chanos is successor in office to Brian Sandoval.

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The Petitioners above-named (the State) file this petition for writ of certiorari seeking an order vacating the June 3, 2005 Opinion and Order of the United States Court of Appeals for the Ninth Circuit, *Collier v. Bayer*, 408 F.3d 1279 (9th Cir. 2005), wherein the Court of Appeals determined that a Nevada state procedural bar, NRS 34.726(1), was inadequate as applied even though the Court of Appeals had previously determined that very procedural bar was generally adequate.

OPINIONS AND JUDGMENTS BELOW

The Court of Appeals reversed the judgment of the District Court. *Collier v. Bayer*, 408 F.3d 1279 (9th Cir. 2005). Appendix A. The petition for rehearing and suggestion for rehearing en banc was denied on August 9, 2005. Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254

N.R.S. 34.726

NRAP 4(b)

STATEMENT OF THE CASE

On May 17, 1995, Steven Collier, the federal habeas petitioner below, pled guilty to one count of possession of a trafficking quantity of a controlled substance. In the plea agreement, the parties stipulated to a forty-five (45) year term of imprisonment. Collier was sentenced to a forty-five

(45) year term of imprisonment.

The court filed the judgment of conviction on July 5, 1995. Appendix K-1.

Collier did not file a direct appeal within the 30 days after entry of the judgment of conviction, nor did he file either a motion in arrest of judgment or a motion for new trial. Thus, pursuant to N.R.A.P. 4(b), the right to appeal his judgment of conviction expired on August 4, 1995. Appendix I-1.

On March 21, 1997, over eight (8) months after his appeal and state habeas opportunities had expired because of the passage of time, Collier filed a motion to correct illegal sentence in state court. Appendix H-2.

On March 26, 1997, the state court filed an amended judgment which included the relevant statutory provisions under which Collier was convicted; however, it did not change Collier's term of imprisonment. Appendix J-1. Collier did not seek reconsideration of his motion to correct an illegal

sentence or appeal the district court's failure to rule on his motion to limit his sentence to 2 years or any other aspect of the amended judgment entered March 26, 1997.

On May 20, 1997, Collier filed a second motion to correct an illegal sentence. The state district court denied the motion. Collier appealed the denial to the Nevada Supreme Court, and it issued an order dismissing the appeal. Appendix H-1.

On November 16, 1998, Collier filed a notice of appeal concerning his conviction. The Nevada Supreme Court dismissed the appeal, finding that Collier's untimely notice of appeal failed to vest jurisdiction in the court. Appendix I-1.

On May 28, 1999, Collier filed a state post-conviction petition for writ of habeas corpus. The State district court denied the petition, finding it procedurally barred. The court also found that Collier was unable to show good cause and prejudice to overcome the bar.

Collier appealed the denial of his post-conviction petition to the Nevada Supreme Court. Appendix G-2 to G-3.

However, prior to the Nevada Supreme Court deciding the appeal, Collier filed a federal petition for writ of habeas corpus, which contained two grounds. Subsequently, Collier filed an amended federal petition. Appendix E-1.

The State moved to dismiss the amended petition based upon exhaustion grounds.

On January 11, 2001, the Nevada Supreme Court entered an order affirming the state district court's denial of Collier's state habeas petition. Appendix G-1.

The Nevada Supreme Court held: —

Appellant filed his petition approximately four years after entry of the judgment of conviction and one and one-half years after entry of the amended judgment of conviction. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was

procedurally barred absent a demonstration of cause for the delay and prejudice. See id.

In an attempt to demonstrate cause for the delay, appellant argued that he was deprived of a direct appeal because his trial counsel failed to inform him of his right to appeal. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate sufficient cause to overcome his delay. See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Appendix G-2.

The federal district court found that Ground One was exhausted and Ground Two was unexhausted. The federal district court gave Collier the option of abandoning the unexhausted ground and proceeding on the remaining fully exhausted ground, or dismissing the